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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

PVM REDWOOD COMPANY, INC., Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

FROM U. S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

PVM Redwood Company, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 13, 1982.

QUESTION PRESENTED

1. Whether or not the taking of a business interest is sustainable under the Fifth Amendment of the United States Constitution.

2. Whether or not on its face the complaint gives fair notice of a claim for which relief can be granted under the Fifth Amendment of the United States Constitution.

PARTIES

Petitioner, PVM Redwood Company, Inc. (hereafter PVM), is a California corporation, with its principal office and place of business within the State of California.

Respondent in this proceeding is the United States of America.

OPINIONS BELOW

The September 13, 1982, opinion of the Court of Appeal, whose judgment herein is sought to be reviewed, has not yet been reported and is reprinted in the separate appendix of this petition. See pages A-1 through A-15. The prior opinion of the United States District Court for the Northern District of California, is also reprinted in the appendix, pages A-16 through A-21.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 USC Section 1254(1) and Public Law 95-250, more commonly known as the Redwood National Park Act qualified under United States Code Sections 98(c) through 79(q) and 28 US Code Sections 1331(a) and 1337.

STATEMENT OF MATERIAL FACTS

On March 27, 1978, the United States passed a law known as the Redwood National Park Expansion Act, Public Law 95-250, 16 US Code Sections 79(a) eq seq. As a direct result of said Public Law, the Secretary of Interior acquired land consisting primarily of redwood timber lands owned by others.

Prior to the Act, PVM Redwood Company, Inc., a redwood sawmill (hereafter PVM), contracted to receive 98% of its raw material from the owners of the land taken by the Act. Since passage of the Act, petitioner's suppliers informed him that they could no longer furnish him with raw materials which resulted in monetary losses to plaintiff in the sum of $150,000.00 per million gross income per year.

On March 29, 1979, PVM filed a complaint against the United States of America seeking recovery upon a theory that the government had taken plaintiff's/petitioner's property without just compensation (A-16-21). The District Court cited in Northern California petitioner's complaint for failure to state a claim upon which relief could be granted reasoning that petitioner had failed to distinguish frustration of business enterprise, an expectancy, or a contractual tangible property right, the taking of which is protected by the Fifth Amendment of the United States Constitution. Said dismissal was affirmed in a two/one decision by the Ninth Circuit Court of Appeals.

BASIS OF FEDERAL JURISDICTION

It is the position of plaintiff/petitioner herein that ongoing contractual rights are tangible property rights protected by the United States Constitution against usurpation without compensation by the Fifth Amendment of the United States Constitution. Further, that Federal Courts cited in the State of California must look to the state law of its situs to determine what property rights are or are not protected.

ARGUMENT AMPLIFYING REASONS FOR WRIT

Under California law, PVM, the petitioner herein, has a personal property interest in the timber for which it contracted. California law provides that "ownership of a thing is a right of one or more persons to possess and use it to the exclusion of others. The thing of which there may be ownership of is called property." California Civil Code Section 654 (West, 1954). Section 2107(2) (West Supplement, 1981) states that a contract for the sale of timber to be severed is a contract for the sale of goods. By identification the parties can affect a present sale before severance and buyers can obtain special property and an insurable interest in the goods. California Commercial Code Section 2501 (West, 1964).

When we look to California law, it is clear from the progressive new statutes that business losses are no longer to be uncompensated when the government takes property contrary to the original proposition that property and just compensation since connoted land or some other tangible object of ownership (See Cormack, *Legal Concepts and Cases of Eminent Domain*, 41 Yale Law Journal 221, 229 [1931]). With the enactment of the California Code of Civil Procedure Section 1263.510 (Deering's 1975) California left behind the excessively real estate orientated view of compensatiable taking that sometimes overly protective courts had clung to. Reasoned the California Law Revision Commission: "Eminent Domain frequently works a severe hardship on owners of businesses effected by public projects. As a rule, business losses have not been compensated. This rule has been widely criticized and the Commission believes that some steps should be taken for damages in eminent domain proceedings for the losses he suffers." California Law Revision Commission Reports, Volume 13, page 1038 (1976).

Trial courts in the Northern District of California have recognized consistently that a "substantial interference amounting to a taking can occur and constitute a valid claim against the government. *Eleopoulous v. Richmond Redevelopment Agency*, 351 Federal Supplement 63, 64 (1972) (citations omitted). The so called requirement of gross physical invasion of property has been found to be legally inessential which can provide government with unjust refuge. *Arastra Limited Partnership v. City of Palo Alto*, 401 Federal Supplement 962 (N.D. Cal. 1972). The Ninth Circuit Trust of Three case (*Trust of Three v. City of Emeryville*, 430 Fed-

eral Supplement page 843) stands for the proposition that a taking may be found by "inferring a taking from a panoply of . . . actions." In a broad scope of court review of legislation alleged to be violative of the Fifth Amendment right is set forth in the Trust of Three as follows: "A . . . court may . . . appraise the nature and scope of governmental behavior, the prior history, the basis upon which the legislative determination was made, and any other relevant facts in determining whether the legislation is reasonable, oppressive or confiscatory." (Id., page 840).

"To constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of the word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or a disturbance of property rights . . . Nor need the government directly appropriate the title, possession or use of properties." *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 Federal 2d 1327, 1330 (Ninth Circuit 1977). The meaning of property in Fifth Amendment compensation cases is determined by the law of the state in which the property is located. *Richmond*, supra; *Pruneyard Shipping Center v. Ribons*, 447 US 74, 84 (1980).

The United States, as opposed to several states, is not possessed of residual authority that enables it to define property in the first instance. *Armstrong v. U.S.*, 364 US 40 (1960); *Thibido v. U.S.*, 187 Federal 2d 249 (Ninth Circuit 1951); *United States v. Puget Sound Power and Light Company*, 147 Federal 2d 953 (Ninth Circuit 1945).

In the instant action the federal government took a property interest that PVM possessed under California state law — its ongoing contracts. The District Court chose a narrow interpretation of what property rights are protected and without examining California statute or state law dismissed the action. On appeal the Ninth Circuit Court gave a cursory examination of PVM's complaint and reasoned by examining the first cause of action alone that there existed no denial of use of real property, PVM's sawmill, when it was the ongoing contracts that were interfered with. There exists no evidence before the court of whether or not PVM has an ownership interest in the source of supply. Because plaintiff/petitioner never had an opportunity to present evidence in support of his allegations contained in his complaint before dismissal.

As stated by the Honorable Circuit Court Judge Alarcon on page 5 of his dissenting opinion:

> "My colleagues' construction of PVM's complaint does not square with these legal principles. The majority determined, by looking solely to Count I of the complaint, that PVM has 'no ownership interest in its source of supplies' because 'it is not clear from PVM's complaint that existing contracts had been frustrated.' Ante at 2. The majority concludes that the dismissal of PVM's complaint must be upheld because 'it would seem that what had been frustrated was an expectancy based on past experience that contracts would be entered into . . .' Ante at 3. I disagree."
>
> It appears to me that the factual allegation in Count II clarifies any possible ambiguity in Count I as to whether PVM had existing contracts for raw materials. In Count II, PVM alleges that its personal property interest has been legislatively taken. 'As a direct and proximate result of Defendant's taking of Plaintiff's business interest and interference with Plaintiff's ongoing contracts for supply of Plaintiff's raw materials,' PVM asserts that it has suffered increased costs. Reading the allegations of the complaint as a whole, and viewing them broadly and liberally, I cannot conclude, as the majority has, that 'a mere expectancy based on past experience' has been frustrated." (A-7-8).

In reviewing a motion to dismiss a complaint for failure to state a claim, the court must examine whether or not the plaintiff can prove any facts to support his claim which would entitle it for relief. The court must construe the pleadings in light most favorable to plaintiff to determine whether the allegations of the complaint, as a whole, if true, would be sufficient to constitute a complaint upon which relief could be granted. *Bouse v. Bussey*, 573 Federal 2d 548, 550 (Ninth Circuit 1977).

Modern philosophy of pleading has been stated by the Supreme Court in *Conley v. Gibson*, 355 US 41, 47-8 (1957): "All the

rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . The federal rules reject the pleading is game skill in which one misstep by counsel may be decisive in the outcome of pleading so as to facilitate a proper decision of the merits."

The function of pleadings is to give the parties fair notice of the nature and basis of grounds of the claim, and the general indication of the type of litigation involved. See *Ross Island Sand and Gravel Company v. General Insurance Company of America*, 472 Federal 2d 750, 752 (Ninth Circuit 1973). "It is axiomatic that the allegations must be read as a whole, and viewed broadly and liberally . . ." *Ostrofe v. HS Crocker Company, Inc.*, 670 Federal 2d 1378, 1381 (Ninth Circuit 1982). On appeal the majority determined by solely looking at Count I of the complaint that PVM had "no ownership interest in its source of supplies" because "it is not clear from PVM's complaint that existing contracts had been frustrated." (See Appendix A-3). The majority concluded that dismissal of PVM's complaint should be upheld because "it would seem" that what had been frustrated was an expectancy based upon past experience that contracts would be entered into. . . (Appendix A-3).

Count II of the complaint clarifies any possible ambiguity in Count I as to whether or not PVM had existing contracts for raw material. Count II cannot simply be dismissed by the majority of the appellate court as superfluous. Appendix A-3, footnote 1.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON A. KARJOLA
Counsel for Petitioner

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STATUTES

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State Statutes:

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Other Authorities:

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